Manager of Kinrara Estate, Petaling Post v Govinda Pillai

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO 35 OF 1975
HARUN J
28 JUNE 1994

Labour Law *— Employment — Claim for wages — Employee's statutory right to be provided 24 days' work or wages in lieu thereof — Whether employee was daily paid or piece rated — Payments for paid public holidays excluded — Employment Ordinance 1955 s 16*

Labour Law *— Employment — Contract of service — Breach of condition by employer — Whether contract automatically terminated — Whether employee could claim under s 16 — Employment Ordinance 1955 ss 13(2) & 16*

The respondent was a rubber tapper employed by the applicant. The wage structure of the respondent under a contract of service with the applicant was governed by an agreement ('the agreement') between the Malayan Agricultural Producers Association ('MAPA') and the National Union of Plantation Workers ('NUPW'). Under cl 11 of the agreement, the respondent was to be paid a basic wage of between RM3.10 to RM3.20 per day. He complained to the labour officer that he was not paid six days' wages for the month of May 1973, ie under s 16 of the Employment Ordinance 1955 ('the Ordinance') the applicant was bound to pay him for 24 days' work if he was fit and willing to work, but the applicant had only paid him 18 days' wages.

The labour officer decided that the respondent came within s 16(1) of the Ordinance as a daily paid worker and ordered the applicant to pay him RM20.40 as seven days' wages. The applicant appealed, contending that the respondent was piece rated and not daily rated and therefore did not come within s 16(1). The applicant also contended that the respondent was estopped from claiming under s 16(2) as the contract of service was deemed to have been broken under s 13(2) on account of breach of condition by the applicant.

Held, dismissing the appeal:

(1) The rate of wages prescribed in cl 11 of the agreement was 'per day' and clearly came within the meaning of 'wages calculated by reference to the number of days' work performed in each month' in s 16(1). Therefore, s 16(1) was applicable.

(2) The applicant was unable to provide 24 days' work to the respondent as it rained on certain days. Nevertheless, the applicant, as employer, was bound to pay the respondent as he

was willing and fit to work. Here he was only paid for 17 days in May 1973 and was therefore entitled to an additional seven days' wages amounting to RM22.40. The payment for Labour Day was excluded from the computation under s 16(1), it being a paid public holiday.

(3) It was entirely left to the respondent whether to terminate the contract of service on account of the applicant's breach under s 13(2) of the Ordinance. The operative word in the section is 'may'. He had not done so and by remaining in service he was not estopped from bringing the claim under s 69 of the Ordinance.

[Bahasa Malaysia summary

Responden adalah seorang penoreh getah yang digaji oleh pemohon. Struktur upah responden di bawah suatu kontrak perkhidmatan dengan pemohon ditentukan oleh suatu perjanjian ('perjanjian itu') di antara Malayan Agricultural Producers Association ('MAPA') dan National Union of Plantation Workers ('NUPW'). Di bawah fasal 11 perjanjian itu, responden itu mesti dibayar upah pokok antara RM3.10 ke RM3.20 sehari. Beliau membuat aduan kepada pegawai buruh bahawa beliau tidak dibayar upah untuk enam hari dalam bulan Mei 1973, iaitu di bawah s 16 Ordinan Pekerjaan 1955 ('Ordinan itu') pemohon mesti membayar beliau untuk 24 hari kerja jika beliau boleh dan sanggup bekerja, tetepi pomohon hanya membayar beliau upah untuk 18 hari.

Pegawai buruh itu telah memutuskan bahawa responden termasuk di bawah s 16(1) Ordinan itu sebagai seorang pekerja harian dan memerintahkan pemohon supaya membayar beliau RM20.40 sebagai upah untuk tujuh hari. Pemohon telah membuat rayuan, dengan menegaskan bahawa responden bukan seorang pekerja harian tetapi dibayar mengikut jumlah kerja yang dibuatnya dan oleh itu tidak termasuk di bawah s 16(1). Pemohon juga telah menegaskan bahawa responden diestop daripada membuat tuntutan di bawah s 16(2) kerana kontrak perkhidmatan itu telah dipecahkan di bawah s 13(2) akibat kemungkiran syarat oleh pemohon.

Diputuskan, menolak rayuan itu:

(1) Kadar upah yang ditetapkan di dalam fasal 11 perjanjian itu adalah untuk 'sehari' dan jelas termasuk di dalam makna 'upah yang dikira secara merujuk kepada bilangan hari kerja yang dilaksanakan pada setiap bulan' di dalam s 16. Oleh itu, s 16(1) terpakai.

(2) Pemohon itu tidak berupaya menyediakan kerja selama 24 hari kepada responden kerana pada beberapa hari tertentu, hujan telah turun. Walau bagaimanapun, pemohon, sebagai majikan, mesti membayar responden kerana beliau boleh dan sanggup bekerja. Di sini beliau hanya dibayar untuk 17 hari pada bulan

Mei 1973 dan oleh itu berhak mendapat upah tambahan untuk tujuh hari yang berjumlah RM22.40. Bayaran untuk Hari Pekerja tidak termasuk dalam perkiraan di bawah s 16(1), kerana ia merupakan suatu hari kelepasan am untuk mana upah mesti dibayar.

(3) Adalah terpulang kepada responden sama ada hendak menamatkan kontrak perkhidmatan itu di bawah s 13(2) Ordinan itu kerana kemungkiran pemohon. Perkataan yang tepat sekali ialah 'boleh'. Beliau tidak berbuat demikian dan dengan meneruskan perkhidmatannya, beliau tidak diestop daripada membawa tuntutan ini di bawah s 69 Ordinan itu.]

Notes

For cases on claims for wages, see 8 *Mallal's Digest* (4th Ed) paras 480–481, 681; [1992] Mallal's Digest 1149.

For cases on contracts of service, see 8 *Mallal's Digest* (4th Ed) paras 490–491, 528.

Legislation referred to

Employment Ordinance 1955 ss 16, 77

VT Nathan (*Shearn Delamore & Co*) for the applicant.
DP Xavier (*Xavier & Vadiveloo*) for the respondent.

Cur Adv Vult

Harun J: This is an appeal under s 77 of the Employment Ordinance 1955 ('the Ordinance') from the decision and order of the Labour Officer, Selangor, arising out of a complaint under s 69 of the aforesaid Ordinance.

The respondent is a rubber tapper in the employment of the applicant. He complained to the labour officer that he was not paid six days' wages for the month of May 1973. In the event, the labour officer decided that the respondent was entitled to such wages under s 16(1) of the Ordinance and ordered the applicant to pay the respondent the sum of RM20.40 being basic wages for seven days. The applicant contends that s 16(1) does not apply to the respondent. Hence this appeal. Section 16 provides:

(1) Where a labourer is employed in any agricultural undertaking on an estate on a contract of service under which he earns wages calculated by reference to the number of days' work performed in each month of his service, his employer shall be bound either to provide him with work suitable to his capacity on not less than twenty-four days in each month during the whole of which he is so employed, or if the employer is unable or fails to provide work on twenty-four days in each month whereon the labourer is willing and fit to work, the employer shall nevertheless be bound to pay to the labourer in respect of each of such days wages at the same rate as if such labourer had performed a day's work:

A Provided that any dispute as to whether a labourer was willing or fit to work shall be referred to the Director General for his decision:

Provided further than in computing twenty-four days for the purposes of this subsection account shall not be taken of more than six days in any work.

B (2) A contract of service shall be deemed to be broken by an employer if he fails to provide work or pay wages in accordance with subsection (1) of this section.

There is no dispute that the respondent is a labourer employed under a contract of service in an agricultural undertaking. The questions that arise are:

C

(a) whether the respondent earns wages calculated by reference to the number of days' work performed in each month; and if so,

(b) whether the applicant had offered the respondent work on 24 days for the month of May 1973.

D The wage structure of the respondent under the contract of service with the applicant is governed by the MAPA/NUPW Agreement 1972 ('the agreement') entered into between the Malayan Agricultural Producers Association ('MAPA') of which the applicant is a member and the National Union of Plantation Workers ('NUPW') of which the respondent is a member.

E

The wage structure consists as follows:

(1) A *basic wage* of RM3.10 or RM3.20 per day according to the prevailing price of rubber.

(2) A price bonus of RM0.05, RM0.10, RM0.15 or RM0.20 per day
F according to the prevailing price of rubber.

(3) An incentive bonus payment for latex brought in excess of a certain poundage fixed for different tasks and calculated on poundage.

(4) A payment for scrap rubber also calculated on poundage basis.

G The respondent is entitled to payment of the basic wages and incentive payments on a *washout day* when he is prevented by rain from completing his normal duties within normal working hours. He is also entitled to such payments (with adjustments and poundage rates and incentive bonus) on a day when tapping cannot commence due to weather condition but offered or allowed to commence *late tapping* after 10am but before 1pm.

H Each tapper is allocated a *task* or tapping area. The task allocated is determined according to terrain, age of the trees and number of trees that a tapper is able to complete within normal hours of work each day. In the respondent's case he was allocated two tasks, viz Task 13 in Field 1963 and Task 15 in Field K12 — one high yielding and the other low yielding,
I each task to be tapped on alternate days. In practice, he may complete his task in less than eight hours (with a half-hour break for refreshment) or more than eight hours. According to the applicant's manager on the estate no employee worked more than eight hours a day. Be that as it may, it is

contended by the applicant that as a tapper is allocated a task and allowed to complete the task in his own time, he is *piece rated* and not *daily rated* and therefore does not fall within s 16(1). I do not find merit in this argument. Clause 11 of the agreement provides:

> A tapper shall be paid a basic wage of *RM3.10 per day* in the price zones of 35/40 cents and *RM3.20 per day* in the price zones of 40/45 cents and above for the performance by him of the full duties of a tapper on his task. (Emphasis added.)

The rate of wages prescribed is *per day* and clearly comes within the meaning of '*wages calculated by reference to the number of days' work* performed in each month of his service' in s 16(1) (emphasis added). I accordingly hold that s 16(1) applies to the facts of this case.

It is common ground that the respondent's basic wage for the month of May 1973 was RM3.20 per day. In that month he worked 17 days as follows:

Monday		7*	14	21*	28
Tuesday	1	8*	15	22*	29*
Wednesday	2*	9	16*	23	30*
Thursday	3*	10*	17*	24*	31
Friday	4*	11	18	25*	
Saturday	5*	12*	19*	26	
Sunday	6	13	20	27	

(* days worked by the respondent.)

On the days not worked, excluding Sundays, it rained. The respondent was paid 18 days wages, ie for the 17 days he actually worked and for 1 May, it being Labour Day and a paid public holiday.

Section 59(1) of the Ordinance provides that every labourer is entitled to a rest day in each month. This provision is reiterated in cl 34 of the Agreement. Sunday is the rest day on the applicant's estate. However, for the purpose of computing the 24 days, the proviso to s 16(1) states that account shall not be taken of more than six days in a week. What this means is that if a labourer works on a Sunday (at double rate as provided for by cl 38 of the agreement) such day worked is not taken into account for the purpose of computing the 24 days. In the present case, the respondent did not work on Sundays. So for the purpose of calculating the 24 days, he should have been offered work on May 9, 11, 14, 15, 18, 23, 26, 28, 31 (nine days in all, out of which seven days could have been selected). Unfortunately, however, it rained on those days and work could not be offered and therefore the applicant was *unable* to provide work. The provisions of s 16(1) are clear and unambiguous. The applicant, as employer, shall *nevertheless be bound to pay* the respondent labourer for the days it was unable to offer work and the respondent being willing and fit to work was entitled to such payment. Here he was only paid for 17 days in the month of May 1973 and therefore is entitled to be paid an additional seven days amounting to RM22.40 as ordered by the labour officer. The payment for

Labour Day is excluded from the computation under s 16(1), it being a paid public holiday.

Lastly, it is contended by the applicant that the respondent is estopped from making this claim as under s 16(2) the contract of service is deemed to have been broken. It is true that the respondent has the right to terminate the contract of service under s 13(2) which reads:

> Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.

I am in agreement with the labour officer, who held that the operative word is *may* and that it was entirely left to the respondent whether to terminate the contract of service in the instant case. He has not done so and by remaining in service he is not estopped from making the claim under s 69 of the Ordinance. Any other interpretation of s 13(2) would lend violence to the language of that subsection as the nature of complaints that could be made under s 69 invariably involves, as here, a breach of the contract of service and would render that section redundant.

For the reasons stated, I dismiss this appeal with costs and confirm the order of the labour officer.

Appeal dismissed.

Reported by Anne Khoo